

SCHOOLS: Sheriff is not authorized to sell lands under
MORTGAGES: school fund mortgages without certified copy of
county court order, made in conformity to Section
10387, R. S. 1939.

May 10, 1943



Hon. Gordon J. Massey
Prosecuting Attorney
Ozark, Missouri

Dear Mr. Massey:

This is in reply to your letter of recent date wherein you request an opinion from this department on the question of the procedure to be followed by the County Court, County Clerk and Sheriff in sales of land to fore-close school fund mortgages.

We find two sections of the statute applicable here. Section 10385, R. S. Mo. 1939, provides in part as follows:

"Every mortgage taken under the provisions of this chapter shall be in the ordinary form of a conveyance in fee, shall recite the bond, and shall contain a condition that if default shall be made in payment of principal or interest, or any part thereof, at the time when they shall severally become due and payable, according to the tenor and effect of the bond recited, the sheriff of the county may, upon giving twenty day's notice of the time and place of sale, by publication in some newspaper published in the county, if there be one published, and if not, by at least six written or printed handbills, put up in different public places in the county, without suit on the mortgage, proceed and sell the mortgaged premises, or any part thereof, to satisfy the principal and interest, and make an absolute conveyance thereof, in fee, to the purchaser, which shall be as effectual to all intents and purposes as if such sale and conveyance were made by virtue of a judgment of a court of competent jurisdiction fore-closing the mortgage. * * * * *

Sec. 10387 provides as follows:

"Whenever the principal and interest, or any part thereof, secured by mortgage containing a power to sell, shall become due and payable, the county court may make an order to the sheriff, reciting the debt and interest to be received, and commanding him to levy the same, with costs, upon the property conveyed by said mortgage, which shall be described as in the mortgage; and a copy of such order, duly certified, being delivered to the sheriff, shall have the effect of a fieri facias on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly."

At first glance it might seem that the sheriff could sell under Section 10385, supra, without the order of court provided for in Section 10387. However, our court in *Benton County v. Morgan*, 163 Mo. 661, in construing these two sections held that the sheriff could not make the sale without the order of the county court, provided for in Section 10387 and said l. c. 676:

"* * * So that these two section are to be taken together and construed together * * * as required by Sec. 9835. * * *"

Referring to the certified copy of the order marked "B" accompanying your request, we do not think it complies with the provisions of Section 10387, because it does not recite the debt, the interest to be received, or a command to the sheriff to levy on same, with costs.

The portion of the order reading "and that the clerk certify proper orders to the sheriff of Christian County" is without authority and void and does not comply with the requirements of Section 10387. The County Court, under that Section, is to make the order and the clerk is only to certify the order to the sheriff which has the force and effect of a fieri facias on a judgment of foreclosure.

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In the case of Neil v. Tubb, 241 Mo. 666, the court, in speaking of the duties of the clerk in respect to such sales, said at l. c. 680:

"* * * The clerk's order to the sheriff to sell the property to foreclose the mortgage reciting therein that the county court had theretofore made an order to that effect was an unauthorized act; the only act in that regard that the statute authorized the clerk to perform was to make a certified copy of the order of the court and deliver it to the sheriff. * * * *"

The form 27, marked "Order of Sale Under School Fund Mortgage" which accompanied your request is not sufficient because it appears to be an order of the county clerk. This statement is supported by the quotation from the Neil v. Tubb case, supra.

On the question of the time at which the sale should be had, we are enclosing copy of opinion dated March 22, 1938, to L. F. Morris, Prosecuting Attorney, LaFayette County, Mo., covering the question.

In the case of Honaker v. Shough, 55 Mo. 472, the court had before it a case where the officers had not complied with the statute in foreclosing a school loan. The court said at l. c. 475:

"* * * * The order of the County Court to foreclose the mortgage did not truly recite the debt, so as to sufficiently identify the mortgage. But the sheriff proceeded as though the order was sufficient and sold the mortgaged premises to the defendant. If the money raised by this sale was paid to the county, as we must presume it was, it extinguished the debt due to the county, or more properly speaking, it transferred the rights of the county to the defendant. He thereby became in equity entitled to the mortgaged debt.

"If the proceedings to foreclose the mortgage had been regularly made under a proper order, the legal title would have

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passed to the defendant. As this was not the case, he could only use the forfeited mortgages to protect him in the possession of the mortgaged premises. As he ought to be substituted to the rights of the county by virtue of the payment of its debt, he does not occupy the relation of a stranger to the mortgage, who has no right to set up a forfeited mortgage to prevent a recovery of the possession by the mortgagor or his heirs. This doctrine was maintained by this court in Jackson v. Magruder, (51 Mo., 55,) and afterward reasserted in Jones v. Mack, (53 Mo. 147,) and it may now be considered as the settled law of this State. * * "

We include this statement for cases in which procedure has not been in accordance with the statutes.

CONCLUSION

We are therefore of the opinion that the sheriff can not make a valid sale of lands under a school fund mortgage until he has received a certified copy of the order of the county court, which order shall recite the debt and interest to be received, commanding the sheriff to levy on the lands with costs, which lands shall be described as in the mortgage, which certified copy of the order has the effect of a fieri facias or a judgment in the circuit court, and that upon receipt of said order the sheriff shall proceed to advertise and sell said lands as is prescribed by Section 10385, supra.

Respectfully submitted,

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APPROVED:

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